STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2014
v	No. 312140 Calhoun Circuit Court
DAVE HARRIS, Defendant-Appellant.	LC No. 2012-000441-FC

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant Dave Harris was convicted after a jury trial of first-degree home invasion, MCL 750.110a(2), and first-degree murder, supported by two theories: first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 117 to 320 months' imprisonment for his first-degree home invasion conviction and to life in prison for his first-degree murder conviction. He appeals as of right. We affirm.

The victim, Ronald Earl Carson, was attacked in his home by defendant on December 21, 2011. Carson suffered significant blunt force injuries to the left side of his head and was hospitalized after the incident; he was taken off life support a week later, when it became evident that he would not recover from his injuries, and he passed away shortly thereafter. The prosecution's theory of the case was that defendant became angry when Carson was unable to repay a $120 loan. On the day of the attack, defendant had a heated conversation with Carson with regard to the loan during a 1:00 p.m. telephone conversation, came to his home four hours later, and struck him several times in the head with a blunt object. A woman living with Carson, Loronda Pitts, witnessed the attack and telephoned 911, but went to her neighbor's residence after making the telephone call because she had warrants out for her arrest. Officers responded to the 911 telephone call, found Carson, and later spoke with Pitts regarding the incident. She knew defendant before the incident occurred and identified him to officers. Officers located defendant at his residence later that evening and eventually placed him under arrest.

Defendant first argues that the prosecution failed to prove that defendant entered the residence without permission or that there was a breaking and entering; thus, he argues, there was insufficient evidence to convict him of first-degree home invasion. See MCL 750.110a(2). Defendant asserts that because there was insufficient evidence to prove the underlying felony,

there was insufficient evidence to convict him of felony murder. See MCL 750.316(1)(b). Defendant also argues that there was insufficient evidence of premeditation to prove first-degree premeditated murder.

"We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When evaluating the claim, "this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The elements of first-degree home invasion, MCL 750.110a(2), are:

> Element One: The defendant either:
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> 1. breaks and enters a dwelling or
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> 2. enters a dwelling without permission.
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> Element Two: The defendant either:
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> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.
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> Element Three: While the defendant is entering, present in, or exiting the dwelling, either:
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> 1. the defendant is armed with a dangerous weapon or
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> 2. another person is lawfully present in the dwelling. [*People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010) (emphasis omitted).]

The first element is the only one disputed on appeal.

To enter "'[w]ithout permission' means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c). Here, Pitts testified that defendant did not knock, ask for permission to enter the home, or say anything as he walked inside. Pitts testified that defendant would, on occasion, "just walk in" without an invitation, but she did not testify that defendant had permission to do so on those occasions and she specifically did not hear Carson give defendant permission to enter the dwelling during their telephone conversation earlier in the afternoon. She testified that nobody gave defendant permission to enter. A rational juror could reasonably infer from Pitts's testimony that defendant did not obtain permission to enter the dwelling and, thus, this element of the offense was satisfied. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). The prosecutor only needed to prove that defendant entered the dwelling without permission *or* committed a breaking and entering. MCL 750.110a(2). See

also *People v Neal*, 266 Mich App 654, 656; 702 NW2d 696 (2005) (internal citation and quotation marks omitted) ("[t]he word 'or' generally refers to a choice or alternative between two or more things").[1] "Once having found that the jury could reasonably draw the inferences that it did, and that the evidence, considered with those inferences, was sufficient to establish defendant's guilt beyond a reasonable doubt, the review of the appellate court is complete." *People v Hardiman*, 466 Mich 417, 430-431; 646 NW2d 158 (2002). Because there was sufficient evidence to convict defendant of the underlying felony, defendant's argument concerning his felony murder conviction must also fail.

We also find sufficient evidence of premeditation and deliberation to sustain defendant's first-degree murder conviction on a premeditation theory. The elements of first-degree premeditated murder are: "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

> To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a "second look." [*Plummer*, 229 Mich App at 300 (internal citation and quotation marks omitted.]

Formation of a plan surrounding the killing is indicative of premeditation and deliberation. See, generally, *People v Johnson*, 460 Mich 720, 732-733; 597 NW2d 73 (1999). Premeditation and deliberation may also be shown by consideration of the following factors: "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992); see also *People v Orr*, 275 Mich App 587, 591; 739 NW2d 385 (2007).

On the day of the attack, defendant had a heated telephone conversation with Carson with regard to an unpaid loan, came to his home four hours later with two other men, looked around to see who else was in the residence, and then struck Carson several times in the head with a blunt object. Defendant mentioned the loan again right before he attacked Carson, indicating that his actions were related to the loan and the earlier telephone conversation. A reasonable inference is that defendant was angry with Carson and decided to kill Carson. There was evidence that defendant "measure[d] and evaluate[d] the major facets of a choice or problem." *Plummer*, 229 Mich App at 300 (internal citation and quotation marks omitted). The fact that defendant was upset about the $120 loan is also evidence of motive and of the "prior relationship of the parties." *Orr*, 275 Mich App at 591. A rational juror could infer that defendant had ample time to think

[1] At any rate, we note that because defendant opened a door to enter the house without having the right to enter it, there was also evidence of a breaking and entering. See *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998).

about his actions beforehand and to take a "second look." *Plummer*, 229 Mich App at 300. A rational trier of fact could have found the second element of first-degree premeditated murder proven beyond a reasonable doubt, and reversal is unwarranted.

Defendant has also filed a standard 4 brief. In that brief, defendant first argues that the trial court violated his due-process rights by permitting jurors to ask questions of witnesses during the trial. Because defendant did not object when the trial court permitted the jurors to submit questions for witnesses, this issue is not preserved. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Accordingly, our review is limited to ascertaining whether plain error occurred affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Michigan court rules and case law clearly provide that a trial court may allow jurors to ask questions of witnesses during a trial. MCR 2.513(I) permits the trial court to allow jurors to ask questions of witnesses. Additionally, in *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), the Michigan Supreme Court held that trial courts, in their discretion, may allow jurors to ask questions of witnesses. There is no evidence of record that the trial court failed to adhere to the dictates of MCR 2.513(I); thus, defendant has failed to meet his burden to furnish a record to verify the factual basis for his argument. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Accordingly, we find no plain error requiring reversal. *Carines*, 460 Mich at 763-764. Defendant also argues in the context of this issue related to jury questions that "as a matter of law reform" this Court should stop the practice of allowing jurors to ask questions. However, the court rules and *Heard*, 388 Mich at 187-188, expressly permit juror questions. As long as case law established by the Michigan Supreme Court remains valid, "this Court and all lower courts are bound by that authority." *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Finally, we reject defendant's unsupported argument that the questioning evidenced that the jurors deliberated before the conclusion of the case.

Next, defendant argues that it was "possible" that Pitts, who had outstanding warrants for her arrest at the time of the incident, was given immunity or other consideration in exchange for her testimony and the prosecution's failure to reveal the existence of this "possible" agreement affected defendant's due-process rights. Defendant's argument is devoid of any supporting factual basis for his claim. Defendant bears the burden of "furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated," *Elston*, 462 Mich at 762, and has failed to do so. Thus, we decline to address this argument further.

Next, defendant argues that the prosecutor committed misconduct by questioning an officer about blood found in defendant's vehicle because it was later revealed during trial that the blood was not Carson's. Defendant asserts that questions about the blood were misleading and had no basis in fact. Defendant failed to preserve this issue and, thus, our review is limited to an application of the plain-error doctrine. *Carines*, 460 Mich at 763-764.

A prosecutor may not knowingly present false testimony to the jury, and a new trial is warranted where there is a reasonable probability that false testimony affected the jury's verdict. See *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992).

We find no basis for reversal with regard to the prosecutor's questions. Contrary to defendant's arguments, the prosecutor was not engaged in eliciting "false" testimony, nor did he ask questions that "had no basis in fact." It is undisputed that officers found human blood in defendant's vehicle. Therefore, the prosecutor did not knowingly present false testimony to the jury. *Id*. Further, the prosecutor did not ask the officer to speculate about whose blood was found or where the blood came from; he only asked the officer to describe the evidence found in the vehicle. Finally, and most importantly, examining and evaluating the questioning in context, *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003), we note that immediately following the testimony concerning the blood found in defendant's car, the parties entered a stipulation into the record indicating that the blood was not Carson's. Therefore, we find no plain error affecting substantial rights.

Finally, defendant alleges several instances of ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's findings of fact are reviewed for clear error." *Id.* Constitutional questions are reviewed de novo. *Id*. Where, as here, no *Ginther*[2] hearing was held, review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "First, the defendant must show that counsel's performance was deficient." *Id*. at 600 (internal citation and quotation marks omitted). "In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id*. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. (internal citation and quotation marks omitted). The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel was ineffective because he "failed to ask the Defendant, before trial, whether he had any witnesses he wished to call, did not talk to the Defendant to go over any possible defenses, or prepare for the case and possible testimony." However, "[a]n attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Moreover, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel . . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant presents no evidence of record with regard to his assertions. Accordingly, defendant has not established that his counsel's performance was objectively unreasonable. Additionally, defendant has failed to demonstrate how counsel's actions or inactions prejudiced him. In light

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of the significant evidence of guilt and defendant's failure to support his appellate claims, we cannot find a "reasonable probability that, but for any of the alleged deficiencies by trial counsel, the result of the trial would have been different." *People v Ramsdell*, 230 Mich App 386, 407; 585 NW2d 1 (1998).

Defendant next argues that his trial counsel was ineffective because he failed to object to evidence about the blood in defendant's vehicle or to the admission of defendant's statement to officers. However, defendant does not make any argument with regard to why his statement was inadmissible and thus objectionable. Accordingly, defendant has not met his burden of showing that trial counsel's failure to object was objectively unreasonable. With regard to the blood evidence, we conclude that it did not affect the outcome of the proceedings, seeing as the parties stipulated that the blood did not belong to the victim.

Defendant argues that his trial counsel made an unprofessional remark during a bench conference and that a competent attorney would not make this type of remark. It is clear from the portions of the bench conference that were transcribed that defense counsel was actively engaged at the time in reviewing the jury questions on defendant's behalf. While the comment was imprudent, defendant has not shown that it indicates that counsel's performance fell below an objectively reasonable standard. In fact, defendant makes no argument with regard to any prejudice he suffered as a result of the comment, and the record does not reflect that any member of the jury heard the remark. We decline to accept defendant's theory that the mere existence of this remark demonstrates incompetence and a breakdown in the attorney-client relationship. Defendant has not shown a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Johnson*, 451 Mich at 124. We find no merit with regard to defendant's claims of ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter